Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

# Reasons for decision

Chris Payton,

*complainant,*

*and*

Teamsters Local Union 938,

*respondent,*

*and*

Purolator Courier Ltd.,

*employer.*

Board File: 28921-C
Neutral Citation: 2013 CIRB **673**
January 28, 2013

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Judith MacPherson, Q.C., Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members, considered the above-noted matter. A Case Management Teleconference (CMT) was held on March 8, 2012 and a hearing was held in Toronto, Ontario, on September 12 and 13, 2012.

**Parties' Representatives**

Mr. Chris Payton, for himself;
Messrs. Ryan D. White and Adam Beatty, for Teamsters Local Union 938; and
Ms. Marsha M. Lindsay, for Purolator Courier Ltd.

These reasons for decision were written by Ms. Judith MacPherson, Q.C., Vice-Chairperson.

**I–Nature of the Complaint**

[1] On August 24, 2011, Mr. Chris Payton (the complainant) filed this complaint under section 97(1) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) alleging his union, Teamsters Local Union 938 (Local 938 or the union), violated its duty of fair representation (DFR) in section 37 of the *Code*, in its representation of him regarding his termination of employment by his employer, Purolator Courier Ltd. (Purolator, the company or the employer).

**II–Background and Facts**

[2] The complainant had been employed with Purolator since 1987 and had been performing mechanical work prior to his termination. On or about April 29, 2008, the complainant received a letter of termination from Purolator dated April 24, 2008, stating he had been absent from the workplace without leave (AWOL) since January 14, 2008 to the present.

[3] By way of background, the complainant had gone on medical leave on or about December 3, 2007. On December 4, 2007, he obtained a medical report for the company's short-term disability insurer on which the doctor noted that the complainant had had eye surgery, required a minimum of four weeks off work and was provisionally assessed as being able to return to work on January 4, 2008.

[4] The complainant provided Purolator with a medical letter dated January 8, 2008 advising that he could return to work on January 14, 2008. The complainant did not return to work on January 14, 2008.

[5] The complainant provided Purolator with a further medical letter dated March 31, 2008, on which the doctor stated "As indicated in our previous letter dated January 8, 2008, Mr. Payton is able to return to work at this time."

[6] The complainant did not return to work and received Purolator's termination letter dated April 24, 2008.

[7] The complainant testified that he had been waiting for a call from the company's nurse who, he alleged, would put him back on payroll in accordance with Purolator's policy, as he had provided it with a medical note confirming he could return to work, as he had been advised to do by his supervisor, Mr. Khan. The complainant also alleged that he was unable to return to work until March, 2008.

[8] The complainant testified that he faxed a grievance letter challenging his termination, directly to the employer on May 7, 2008, addressed to Byron Mortley, the human resources consultant who signed the termination letter. The complainant had also addressed this letter to "Union Representative," but admitted that he had not sent it to the union, which denied receiving it.

[9] On August 18, 2008, the complainant called the employer's human resources co-ordinator, Ms. Joan Williams, who, he alleged, advised him that she had tried on three occasions to contact him by telephone to advise him to return to work, but he had not answered, and he advised her that the telephone number she had been using to contact him was no longer his number. The complainant testified that, during that call, Ms. Williams denied that Purolator had received any document from him purporting to be a grievance, and told him that he had to file a grievance with the union, and directed him to Mr. Shahan Simon.

[10] Mr. Simon was the union's bargaining representative for the complainant's bargaining unit at Purolator. He testified that he first learned on August 18, 2008 from Ms. Williams that the complainant's employment had been terminated.

[11] On September 5, 2008, the complainant called the union regarding his termination and left a message for Mr. Simon which Mr. Simon returned on September 9, 2008. He advised the complainant to fax him the grievance letter and any other documentation he had concerning his termination on or before September 16, 2008.

[12] On September 16, 2008, the complainant faxed Mr. Simon his termination letter, the January 8, 2008 medical letter, a document dated September 16, 2008 that the complainant described as his "grievance" and a fax confirmation sheet which sheet indicated that a one-page document had been faxed on May 7, 2008.

[13] Mr. Simon testified that, during a call with Ms. Williams in October, 2008, she advised that no grievance arising from the complainant's termination had been filed and that Purolator's position was that any potential grievance about this would be considered to be untimely. He was also advised by Ms. Williams that Purolator's position was that two doctor's notes indicated the complainant was able to return to work as of January 14, 2008, its attempts to contact the complainant were not successful, the complainant had been AWOL since January 14 and that the termination of his employment was therefore justified. Following this, Mr. Simon spoke to the complainant and advised him of Purolator's position, that no grievance had been filed, that Mr. Simon would again speak to Purolator about the complainant's circumstances and call him back.

[14] Between 2008 and 2011, a series of telephone conversations ensued between Mr. Simon and the complainant. The parties agree that, in one of their earlier conversations, Mr. Simon advised the complainant that Purolator's position was that no grievance had been filed and any grievance filed would be considered to be untimely, and, in another conversation, Mr. Simon advised the

complainant that the union agreed with Purolator's position. The parties also agree that, in a telephone conversation in either August 2010 (according to the complainant) or April 2010 (according to Mr. Simon), Mr. Simon advised the complainant that he was not referring the complainant's case to arbitration. During that same conversation, Mr. Simon further advised the complainant that he would ask Purolator one more time to consider re-instating the complainant and/or pay compensation, and get back to him with the response, but Mr. Simon advised that, regardless of the response, he was not referring the complainant's case to arbitration.

[15] In approximately April, 2010, the complainant advised Mr. Simon that he was owed a week's wages by Purolator as he had worked the last week before his December 3, 2007 surgery "off the payroll," as authorized by Mr. Khan. Mr. Simon advised that he would contact Mr. Khan and ask him if he would corroborate the complainant's allegations. In a later call, Mr. Simon advised the complainant that he had spoken to Mr. Khan who had denied the complainant's allegations about an agreement to work "off the payroll." Although the parties do not agree on the date when Mr. Simon reported Mr. Khan's response to Mr. Payton, this date is not determinative of the Board's decision regarding this matter.

[16] On May 5, 2011, Mr. Simon and the complainant spoke during which conversation Mr. Simon advised the complainant that the employer would not change its position. The complainant testified that, after this conversation, he began searching for another job.

[17] On June 9, 2011, Mr. Simon and the complainant spoke during which conversation Mr. Simon advised the complainant's file was closed.

[18] The complainant filed the instant complaint with the Board on August 24, 2011.

**III–Positions of the Parties**

**A–The Complainant**

[19] The complainant alleges that the union acted in an arbitrary, discriminatory and bad faith manner, contrary to section 37 of the *Code*, in representing him regarding his termination.

[20] The complainant submits that upon receiving his letter of termination in April, 2008, he filed a timely grievance on May 7, 2008, and once he was advised that Purolator had not received it and was told to file with the union, he promptly did so. He submits that despite this, both the employer and the union took the position that the grievance was not filed or was filed late and would be out of time. This, according to the complainant, was arbitrary conduct and unfair treatment.

[21] The complainant submits that Mr. Simon did not properly investigate his matter, did not communicate with him promptly or appropriately and provided no assistance to him regarding his termination, and his issues of compensation for a week of unpaid wages and unpaid medical expenses.

[22] The complainant submits that he had to keep calling Mr. Simon and leaving messages for him as Mr. Simon would not return his calls or would return these at a much later date. He submits that Mr. Simon never followed through with what he said he would do and that the union's failure to take any action with respect to his issues, amounted to bad faith conduct.

[23] In response to the union's timeliness objection, the complainant states that he filed the instant complaint with the Board on a timely basis and submitted that it was on June 9, 2011 that he learned of the actions of the union which gave rise to his complaint, which he filed on August 24, 2011 within the 90-day time limit.

[24] The complainant acknowledges that Mr. Simon advised him in May, 2011 that he would not be getting his job back, so he commenced his job search at that time.

[25] In the instant complaint, the complainant requests the Board order that his grievance be heard and that he be paid compensation owing to him.

**B–The Union**

[26] The union submits that the complaint was filed out of time and should be dismissed as being untimely.

[27] In the alternative, the union submits that the complaint does not disclose any conduct of the union that would amount to a breach of its DFR pursuant to section 37 of the *Code*.

[28] The union submits that Mr. Simon advised the complainant early on in their discussions, that Purolator was taking the position that no grievance had been filed, that any grievance would be considered out of time and that Purolator considered the termination to be justified given his failure to return to work after the medical notes on file indicated he was able to return to work. The union submits that the complainant was also advised that the union was in agreement with Purolator, in light of the evidence gathered and the collective agreement provisions that provide ten working days for filing a dismissal grievance, that time limits are mandatory and that termination is the penalty for being AWOL for three or more consecutive days.

[29] The union maintains that the complainant knew or ought to have known by no later than October, 2009 of the circumstances giving rise to his complaint. By that time, the union had made clear to the complainant that both the employer and the union were of the view that no grievance had

been filed, and that any grievance advanced would be considered to be both untimely and without merit. Alternatively, the union submits that the complainant knew or ought to have known in April, 2010 of the circumstances giving rise to his complaint when he was advised by Mr. Simon that his case would not be referred to arbitration.

[30] Finally, the union submits that the complainant has failed to provide any reasonable explanation for the delay in filing his complaint with the Board to justify the Board intervening to extend the time limits for filing his complaint.

[31] With respect to the merits of the complaint, the union denies acting in an arbitrary or discriminatory manner or in bad faith, in violation of section 37 of the *Code*, in this matter.

[32] The union submits that Mr. Simon, once contacted by the complainant, made the necessary inquiries of the employer and the complainant and reasonably concluded that there was insufficient evidence to establish that a grievance had been filed in a timely manner. Moreover, he reasonably concluded on the basis of the medical notes on file that even if a grievance had been filed in a timely manner, the grievance would have lacked merit.

[33] The union denies any arbitrary, discriminatory or bad faith conduct on its part, contrary to the complainant's allegations and submits that despite the lack of a timely grievance or merit to such grievance, the union nevertheless made numerous attempts to discuss the matter with the employer and try to persuade the employer to have the complainant returned to work.

[34] The union submits that it has fulfilled its DFR owed to the complainant regarding this matter, that the complainant has failed to establish that it has violated section 37 of the *Code* and submits that the complaint should be dismissed.

**C–Purolator**

[35] Purolator did not respond to the application although it was given the opportunity to do so by the Board.

**IV–Analysis and Decision**

**A–Timeliness**

[36] The union submits that the complaint was filed in an untimely manner as the complainant wasadvised as early as October, 2009, but in any event by April, 2010, that the union would not pursue the complainant's case to arbitration. The complainant testified that the union advised him in August, 2010 that it would not take his case to arbitration, but submits his complaint was filed on a timely basis as he did not understand the arbitration process and only learned on June 9, 2011 that the union had closed his file and would do nothing further for him.

[37] Before the Board can consider the issue as to whether the union violated the DFR it owed to the complainant, the Board must decide whether the complaint was filed within the time limit prescribed by section 97(2) of the *Code* which provides:

> 97.(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

[38] Under section 97(2), a DFR complaint must be filed with the Board within 90 days of the date on which the complainant knew or, in the Board's opinion, ought to have known, of the circumstances giving rise to the complaint. The 90-day statutory time limit serves to provide finality and certainty which is important in establishing and maintaining constructive labour-management

relations. The 90-day time limit also allows for potential disputes to be settled in a timely manner so as to ensure effective industrial relations in the workplace and to preserve sound labour management relations (see *McRae Jackson*, 2004 CIRB 290, paragraph 51).

[39] The 90-day time limit is mandatory as reflected by the use of the words "must be made." The Board's jurisprudence is clear that the 90-day time limit begins to run from when the complainant has first been made aware or ought to be aware, of the union's decision not to process a grievance or to refer it to arbitration (see *Blakely*, 2003 CIRB 241, at paragraph 24; and *Coull* (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957)).

[40] Moreover, the union subsequently re-confirming its previous decision in this regard, or a "fresh" denial, will not serve to restart the 90-day time clock (see *Pinel*, 1999, CIRB 19; and *Blakely*, *supra*). Regarding the timeliness of a complaint, section 16(*m*.1) of the *Code* also provides the Board with the power to extend the 90-day time limit for the filing of a complaint.

[41] The Board exercises its discretion to grant an extension of the time limit under section 16(*m*.1) of the *Code* only if it is requested and only if the complainant can establish compelling circumstances for the Board to do so, such as that he was unable to file his complaint, or prevented from doing so or had an impediment which prevented him from filing his complaint within the time limits set out in the *Code*. Oversight or negligence on the part of a complainant is not considered as a sufficient reason (see *Galarneau*, 2003 CIRB 239). Further, the Board does not exempt unrepresented parties from the obligation to comply with the time limits under the *Code*, which time limits apply equally to all affected parties (see *Torres*, 2010 CIRB 526).

[42] The Federal Court of Appeal has upheld the Board's jurisprudence which has strictly enforced the 90-day time limit for filing a complaint and measuredly exercised the statutory discretion to grant an extension of time pursuant to section 16(*m*.1) of the *Code* (see *Buenaventura Jr.* v. *Telecommunications Workers Union*, 2012 FCA 69; and *Hudgins* v. *Attorney General of Canada*, 2012 FCA 185).

[43] The onus is on the party who seeks to assert his rights, that is, the complainant in the present matter, to persuade the Board to exercise its discretion to extend the time limit, by providing evidence to establish that compelling circumstances exist to explain his inability to file his complaint within the prescribed time limit. The union's DFR is predicated on the requirement that employees must take the necessary steps to protect their own interest and exercise due diligence in pursuing their claims. The Board assesses each request for an extension of the time limit on a case-by-case basis.

[44] In this case, the complainant did not request that the Board exercise its discretion to extend thetime limits, as he argued that the complaint was timely. Further, the complainant argues that it was not until June 9, 2011 that he understood that the union would do nothing further for him and that this date should be the trigger to commence his time limit.

[45] Mr. Simon testified that it was only in April, 2010 that the complainant advised him that he had worked "off the record" without pay during the week prior to his December 3, 2007 surgery, that Mr. Khan would corroborate this and he requested compensation for the week's work. Mr. Simon agreed to contact Mr. Khan and ask him if he would corroborate the complainant's allegations in this regard. Mr. Simon also testified that, in that conversation, he advised the complainant that he was not taking his case to arbitration to get his job back and that the complainant needed to move forward. Mr. Simon testified that he advised the complainant that he would nevertheless ask Purolator one more time to consider re-instating the complainant and/or paying compensation, but regardless of Purolator's response, he was not referring the complainant's case to arbitration.

[46] Mr. Payton testified that, in August 2010, Mr. Simon advised him that he was not taking his case to arbitration; but he would nevertheless ask Purolator one more time to consider re-instating him and/or paying compensation, but regardless of Purolator's response, Mr. Simon was not taking his case to arbitration. By the complainant's own admission, he knew as of August, 2010 that the union was not proceeding with his case to arbitration, but that Mr. Simon would ask Purolator one

last time to consider reinstating him and/or paying compensation. Despite the complainant's testimony that he did not understand Mr. Simon's reference to arbitration and that he decided to wait for Purolator's response before making an effort to find another job, the Board does not find the evidence supports his allegations in this regard. The complainant had been employed with Purolator since 1987, had been a long standing member of the union and had personally had two previous grievances. Further, he testified that the union had been at Purolator for many years.

[47] Based on the evidence presented and giving the complainant the benefit of the doubt, the Board finds that the complainant knew, or ought to have known, as of August, 2010 that the union was not pursuing a grievance on his behalf or taking one to arbitration. The Board notes that the complainant, by his own admission, was aware as of August, 2010 of the union's decision not to take his case to arbitration and to take no further action on his case, other than a last attempt to approach the employer to consider reinstating him and/or paying compensation. In the Board's view, the complainant knew or ought to have known, as of August, 2010 of the circumstances giving rise to the complaint. The Board finds that this evidence is sufficient to trigger the 90-day time limit for the complainant to file a complaint against the union for a breach of its DFR. After learning this, there is no evidence that the complainant took any steps to file a complaint until almost a year later.

[48] The complainant disputes that this conversation should trigger the running of the time limit and submits that it was not until June of 2011, that he truly understood that he would not get his job back and the union would do nothing more for him and that his file was closed. Mr. Simon had some documentary evidence of his telephone conversations regarding the matter including his calls with the complainant. These confirm that, in 2011, he and Mr. Payton spoke on May 5 and June 9.

[49] The complainant testified that on May 5, 2011, Mr. Simon reported to him that Mr. Khan denied that he had permitted him to work "off the payroll" and that, since there was no proof of this, the union could do nothing further for him, and that it was closing his file and would send him a copy of it. The complainant testified that he only then began to search for another job. The complainant

testifies) that he called Mr. Simon on June 9, 2011 as he had not received a copy of his file and Mr. Simon advised him that his file was closed.

[50] The Board has considered the evidence regarding the May 5 and June 9, 2011 calls, and finds that these conversations amounted to a confirmation of the union's earlier advice to the complainant in 2010, that it would not proceed with the complainant's case. They may be considered to be a "fresh denial" in the sense discussed in *Blakely, supra*, and would not re-start the running of the time limit for purposes of section 97(2) of the *Code*.

[51] Even if the Board were to accept the complainant's assertion, which it does not, that he did not understand that the union was not going to do anything further on his case until his June 9, 2011 conversation with Mr. Simon, the Board finds, based on the complainant's testimony, that he clearly knew, or ought to have known, by their May 5, 2011 conversation that the union was not proceeding on his case and was closing his file. With May 5, 2011 being the date for commencing of the time limit for purposes of section 97(2) of the *Code*, the complaint would still have been filed approximately 20 days beyond the 90-day time limit and would thus still be untimely.

[52] Also, the Board notes that the complainant lacked evidence to establish many of his allegations, such as that, on May 7, 2008, he faxed a grievance to Purolator which it denied receiving. After being advised by Mr. Simon that his alleged May 7 fax confirmation was insufficient to prove this, he provided nothing further. Moreover, in reviewing Mr. Payton's overall testimony, the Board notes that much of it supports the evidence of the union. For example, after he advised Mr. Simon that the reason he had not contacted Purolator to be returned to work over his lengthy absence was that he had been told to wait for Purolator's call and was trained to follow orders, Mr. Simon advised him that that was not a good excuse. Further, the Board notes Mr. Payton's testimony that Mr. Simon advised him in October 2008 that his grievance was untimely, and that Mr. Simon only spoke to him to request proof of his case and considered his verbal explanations as worthless.

[53] As indicated, the complainant did not request that the Board exercise its discretion to extend the time limits, arguing that his complaint was timely. In any event, the Board finds that the complainant did not establish any compelling circumstances that would have prevented him from filing his complaint in a timely manner, so as to justify the exercise of the Board's discretion to extend the time limit.

[54] Having carefully reviewed all of the evidence presented and material on file, the Board finds the complaint to have been filed in an untimely manner and dismisses it accordingly, for all of the reasons stated above.

[55] This is a unanimous decision of the Board.

Judith MacPherson, Q.C.
Vice-Chairperson

John Bowman
Member

Robert Monette
Member